SUPREME COURT, U. S.

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NO. 668

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

JOSEPH STASSI, SR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

JOSEPH STASSI, SR., PETITIONER, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered against him on August 29, 1968 and styled "Joseph Stassi, Sr. v. United States of America, No. 24,734". (R. 1409-1424).

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause is as yet unreported but a copy of said opinion is attached hereto and included herein for all purposes as Appendix "B".

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1). The opinion of the United States Court of Appeals for the Fifth Circuit in this cause is in conflict with the Constitution and laws of the United States and the holdings of other United States Courts of Appeals interpreting said Constitution and Laws. The Judgment in this cause became final on August 29, 1968 upon the rendering of the opinion in this cause in the United States Court of Appeals for the Fifth Circuit.

On September 30, 1968, Associate Justice Hugo L. Black ordered an extension of time for the filing of a Writ of Certiorari by Petitioner herein to and including October 21, 1968. A copy of said Order is attached hereto and included herein for all purposes as Appendix "C".

QUESTIONS PRESENTED

FIRST QUESTION

Has the Defendant been denied effective assistance of counsel and right of confrontation and cross-examination protected by the Fifth and Sixth Amendments to the Constitution of the United States, where the Defendant's Federal District Court conviction was secured as follows:

1.) Pre-trial Motion for Production and Inspection of Grand Jury Minutes, was timely made;

2.) The witness had testified before the Grand Jury;

3.) The Grand Jury Minutes were available to the Court and the United States Attorney;

4.) The witness was a key Government witness and testified at trial, and;

5.) Trial Court and Fifth Circuit Court of Appeals held that the Defendant must show *particularized* need for Grand Jury testimony before production is necessary, pursuant to Rule 16 of the Federal Rules of Criminal Procedure?

SECOND QUESTION

Have the Petitioner's Fourth, Fifth and Sixth Amendment rights to be free from unreasonable searches and seizures, rights of confrontation and cross-examination, compulsory process, effective assistance of counsel and due process of law been violated, when:

(1) The Federal Government admitted unlawful electronic eavesdropping and filed logs with the Federal Court of Appeals; and

(2) information reflected in the logs was utilized at both the proceeding, out of which grew the Petitioner's perjury indictment, and perjury conviction; and

(3) the Federal Court of Appeals conducted an *in camera* ex parte inspection and determination of relevancy in lieu of remanding to the Federal District Court for adversary proceedings so that the records of such electronic eavesdropping might be subject to an *in camera* inspection by the trial judge to determine the relevancy of the information obtained through unlawful electronic eavesdropping and the necessity of compelling the Government to make disclosure of such records to Petitioner?

THIRD QUESTION

Does the Government's admission that the Petitioner's Fourth Amendment rights to be free from unreasonable search and seizure have been violated by unlawful electronic eavesdropping require an adversary proceeding in the Federal District Court in order to ascertain whether said violation contributed in any manner directly or indirectly to the Petitioner's conviction in Federal District Court?

FOURTH QUESTION

Can a perjury conviction in Federal District Court be predicated upon testimony taken before a United States Commissioner at a void proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The statutory provisions involved herein are Rules 5(b), 5(c), 9(c)(1), 16(a), 16(b) and 40(b)(3), Federal Rules of Criminal Procedure and Title 18, United States Code, Section 1621. The constitutional and statutory provisions, are set forth in Appendix "A".

STATEMENT OF THE NATURE OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE:

The Petitioner, Joseph Stassi, Sr., was charged by an indictment returned on July 26, 1966, in the United

States District Court for the Southern District of Florida, for a violation of the provisions of Title 18, U.S.C., Section 1621. (R. 12-15).

Petitioner elected to be tried by a jury; pursuant to the Government resting, Petitioner moved, pursuant to Rule 29(a), Federal Rules of Criminal Procedure, for a Judgment of Acquittal, which motion was denied by the Court. (R. 1298). Petitioner did not introduce any evidence, the case was submitted to the jury on January 28, 1967, with a verdict of guilty being returned on February 1, 1967. On April 21, 1967, the Petitioner was sentenced to serve four (4) years in a United States Penal Institution in the custody of the Attorney General of the United States and to pay a fine to the United States in the sum of Two Thousand ($2,000.00) Dollars. Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit, which Court affirmed said conviction on August 29, 1968. (R. 1409-1424). (Appendix B).

2. FACTS MATERIAL TO THE QUESTIONS PRESENTED:

The Petitioner was jointly charged with six (6) other persons with a violation of Title 21, United States Code, Section 174 by an indictment returned on November 1, 1963, in the United States District Court for the Southern District of Texas in cause number 63-C-29. A prior indictment concerning this matter had been returned in cause number 63-C-25 in which the Petitioner had been charged as a co-conspirator but not as a co-defendant. From the approximate date of the return of indictment (63-C-29), on November 1, 1963, until January 25, 1966, the Petitioner was a fugitive and therefore was not tried upon indictment in cause number 63-C-29, until

February of 1967 before the United States District Court for the Southern District of Texas at Corpus Christi.

The evidence introduced at trial consisted of testimony and evidence gathered by the Government through various searches and seizures and the arrest of several co-conspirators who had in their possession twenty-two (22 lbs.) pounds of heroin at the time of their arrest in Houston, Texas, on November 7, 1962. The evidence further reflected that the Government had had information for a substantial period of time prior to November 7, 1962.

Subsequent to the arrest of Petitioner, on January 25, 1966, in the Southern District of Florida, a hearing was had before United States Commissioner, Edward P. Swan, on January 26, 1966, a Commissioner for the United States District Court for the Southern District of Florida, at Miami, Florida, said case being Commissioner's Docket No. 3, cause number 66-746, (R. 12), styled "United States of America v. Joseph Stassi". (R. 185, Government's Exhibit "7").

On the occasion of the hearing on January 26, 1966, before Commissioner Swan, said hearing being in the nature of a removal or identification proceedings conducted post-indictment, after an original bond had been set by the District Court for the Southern District of Texas in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Subsequent to said hearing the Petitioner was charged by an indictment returned in the United States District Court for the Southern District of Florida, by which the Petitioner was charged with a violation of Title 18, U.S.C., Section 1621, in cause number 66-278-CR-WM which charged the Petitioner with having testified falsely, under oath, to material matters in a Bail Bond hearing before

United States Commissioner Swan. The indictment set forth the following questions and answers before the Commissioner:

"Q. Do you have a United States Passport under the name of a Michael Frank Dorsi—D-O-R-S-I?
A. No, Sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir."

* * *

"Q. (By Mr. Bates) Just going back here, as I understand you, you did not obtain or have anything to do with an issuance of a passport in the name of a Michael Frank Dorsi—a U.S. passport F288402, issued April 10, 1965, in Washington, D.C.?
A. No, sir."

* * *

"THE COMMISSIONER:
Let me ask a couple of questions before you make any statement.
Have you ever had a passport?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Do you know anything about the questions asked you by the Government dealing with a passport in Washington, D.C.?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Did you ever pose for any passport pictures?

THE WITNESS:
I have had pictures taken, but I never applied for a passport.

THE COMMISSIONER:
And is it my understanding that you do not have a passport at this time?

THE WITNESS:
Correct." (R. 12-14).

The foregoing testimony was taken by Commissioner Swan in conducting a removal hearing, pursuant to Rule 40(b)(3), Federal Rules of Criminal Procedure, (R. 180-181), upon an oral Motion urged by the Petitioner to reduce the bond set by the Federal District Court of Texas and a hearing for removal. The testimony referred to hereinbefore, which was set forth in the indictment was a portion of the testimony taken at said hearing upon which the indictment for violation of Title 18, U.S.C., Section 1621, was returned.

The specific testimony for which the Petitioner was convicted of a violation of Title 18 U.S.C., Section 1621, was upon the following:

"Q. Do you have a United States passport under the name of a Michael Frank Dorsi—D-o-r-s-i?
A. No, sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir."
(R. 190-191).

The hearing before Commissioner Swan was after an indictment had been returned in the United States District

Court for the Southern District of Texas, a Bond was set in Texas, post-indictment, the indictment having been returned in March of 1963, (R. 198), and there was no written motion or other written application before the Commissioner to support the hearing.

A key Government witness was Francis G. Rando, the only Government witness to testify with respect to the vital issue of whether a passport was ever received by the Petitioner. In the course of the trial it came to light that Mr. Rando had testified before the Grand Jury and a request was made for the Grand Jury testimony of said witness. (R. 470, 495). The United States Attorney admitted that said witness had testified before the Grand Jury that returned the indictment and that said testimony had been transcribed and was available and as a matter of fact, the United States Attorney had "no objection to an *in camera* inspection of the Grand Jury testimony." (R. 495-496). The Court refused to conduct an *in camera* inspection and refused to make said Grand Jury testimony available to Attorney for Petitioner, unless a particularized need was shown for the production of said Grand Jury testimony. Attorney for Petitioner pointed out to the Court that without the availability of said witness' testimony, that there was no way to demonstrate a particularized need for said testimony. (R. 496).

On or about July 10, 1968, the United States Attorney for the Southern District of Texas, filed with the Clerk of the United States Court of Appeals for the Fifth Circuit, in cause number 24,734, then pending before the Fifth Circuit, sealed envelopes marked "To Be Opened By The United States Court of Appeals Only", which allegedly contained notes and logs of conversations in which the Petitioner was a participant, which were overheard by

the Government sometime during the year 1962, the Petitioner being identified as Joe Rogers, an alias utilized by the Petitioner. (R. 1422-1423). The name of Joe Rogers was referred to at the hearing before the United States Commissioner, Edward P. Swan, on January 26, 1966, (Government's Exhibit "7"; R. 242, 243, 247).

In the opinion delivered on August 29, 1968, in cause number 24,734, by the United States Court of Appeals for the Fifth Circuit, it appears that the Fifth Circuit made an *in camera* examination of said tendered logs of conversations in which Joe Rogers was a participant, which transpired in 1962, made an ex-parte determination that said logs were too remote in time and were therefore unrelated to the case pending before the Fifth Circuit and did not remand to the trial court for an adversary proceeding in order to determine relevancy and whether any information therein was utilized in the hearing which took place before Commissioner Swan on January 26, 1966, or the trial of the Petitioner for violation of Title 18, U.S.C., Section 1621.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

This Honorable Court should grant Certiorari herein to decide the conflict existing between the United States Circuit Court of Appeals in their interpretation and application of *Dennis v. United States,* 384 U.S. 855, 86 S. Ct. 1840. There is a conflict between the United States Circuit Court of Appeals for the Fifth Circuit, reflected in the opinion of the instant cause and the United States Court of Appeals for the Second Circuit, reflected in the

opinion in *United States v. Youngblood,* 379 F.2d 365, (2nd Cir. 1967); and the United States Circuit Court of Appeals for the District of Columbia, *Allen v. United States,* ___ U.S. App. D.C. ___, 390 F.2d 476, (1968); *Gibson v. United States,* ___ U.S. App. D.C. ___, 3 Cr. L. 2489, (1968).

The interpretation hereinabove creates a conflict in the interpretation of Rule 16 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States. The importance of the application and the conflict of the right of discovery in a criminal proceeding as it is applicable to Rule 16, F.R.C.P. and the interpretation of Rule 16, as amended is of such importance that this Honorable Court should review the conflict and holding of the Court below which required a showing on behalf of the Petitioner for a particularized need for the Grand Jury testimony as a requirement precedent to the production of the Grand Jury testimony, as the holding below is in direct conflict with the holding of other Circuits as hereinbefore demonstrated and enumerated and contrary to Rule 16 (g), F.R.C.P., as amended. The present amendment of the Rule was designed to eliminate discord and conflict over the interpretation of the Rule.

To further demonstrate the conflict in the attitude of the various Circuits, Circuit Judge Waterman, writing the opinion in the case of *Youngblood v. United States,* 379 F.2d 365, 370, enunciates the following procedure to be followed in the Second Circuit:

> "(3) For the foregoing reasons we direct that at trials commencing after our judgment here is entered, the district courts of this circuit at the request

of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material; we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial."

II.

This Honorable Court should grant Petitioner's Petition for Writ of Certiorari herein, to determine whether a defendant should be deprived of his Fourth, Fifth and Sixth Amendment rights by refusing to permit a defendant an adversary proceeding in the trial Court in any and all cases where the Government has admitted a violation of the defendant's Fourth Amendment rights by conducting unlawful electronic eavesdropping upon said defendant. This Honorable Court in *Kolod v. United States,* 390 U.S. 136, 19 L.Ed.2d 962, 88 S.Ct. held that the Court would not accept the ex parte determination of the Department of Justice that information secured by unlawful electronic eavesdropping was not relevant in lieu of said determination being made by an adversary hearing in the trial court. The Petitioner realizes that by the time that this Petition is presented that *Kolod v. United States,* is to be re-argued before this Honorable Court and further that *Ivanov v. United States,* 384 F.2d 554 (3rd Cir., 1967), and *Desist v. United States,* ____F.2d____, 2 Cr. L. 2104 (2nd Cir., 1967), are set for argument before this Honorable Court and that the question to be presented to the Court in *Ivanov* concerns a violation of the Petitioner's Fourth Amendment rights being infringed upon by electronic surveillance and whether the records

of such electronic surveillance should be subject to an *in camera* inspection to determine the necessity of the Government disclosing such records to the Petitioner.

The Court is urged to consider the ruling below for the reason that said ruling presupposes that the Fourth, Fifth and Sixth Amendment rights, as reflected in the Rules implementing said constitutional rights, to-wit: Rules 3, 4, 6, 16 and 41, of the Federal Rules of Criminal Procedure may be determined in the absence of counsel and without the necessity of the accused enjoying the guiding hand of counsel at a critical step in his trial. The importance of the right of counsel, as determined by the Court below, is contrary to this Court's interpretation of the right of counsel and the right to enjoy the assistance of counsel, reflected by this Court's opinion in *Gideon v. Wainwright,* 372 U.S. 355; *In Re Gault,* 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428; *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh. den., 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288; *Mempa v. Rhay,* 389 U.S. 128; *Wade v. United States,* 388 U.S. 218; *McConnell v. Rhay; Stillner v. Rhay,* 37 L.W. 3131. To deprive the Petitioner of a plenary determination and representation by counsel, is to ignore the teachings of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

III.

This Honorable Court should grant Certiorari and review the interpretation placed upon 18 U.S.C., Section 1621 by the opinion rendered in the instant cause by the United States Court of Appeals for the Fifth Circuit. The conviction in the District Court and the opinion by the

Fifth Circuit in this cause reflect that the Fifth Circuit construes this Statute as being violated on any occasion wherein sworn testimony is taken before an individual authorized to give the oath, and further that the materiality of the testimony to the issues before the judicial officer is not essential.

Further this Court should determine whether the scope and application of Rule 40(b)(3), Federal Rules of Criminal Procedure authorized a United States Commissioner to hold a post-indictment proceeding to reduce bond set by a United States District Judge in a foreign district wherein the indictment was returned and pursuant to such proceeding, testimony was taken which was the basis of the perjury indictment and conviction in the instant cause.

The unconstitutionality of the interpretation of Section 1621 as construed by the Fifth Circuit is demonstrated by the records in this case whereby the Fifth Circuit has affirmed a conviction for perjury, on testimony taken before a United States Commissioner, post-indictment, where the only material, relevant, germane facts to the hearing concerned the identity of the Petitioner. The testimony upon which the Petitioner was convicted was not material to the issue of identification of the Petitioner in that the Petitioner testified that his name was Joe Stassi. He was indicted in the Southern District Court of Texas under the name of Joseph Stassi, alias Joe Rogers. The material, and germane, facts and issues before the Commissioner on a removal proceeding is the identity of the accused. In the testimony elicited before the Commissioner the testimony would be proved, if accepte that the Petitioner was not Joe Rogers, and there

would have resulted in the removal being denied the Government where the Defendant did not make an issue of his identification.

Pursuant to the requirements of Rule 40(b)(3), F.R.C.P., the Commissioner could not have reduced the bond set on the Indictment by the District Judge of the Southern District of Texas. Therefore, the testimony and evidence concerning whether or not Joseph Stassi had previously secured or obtained a passport in some other name was not material nor germane to the factual material issues to be determined by the United States Commissioner.

The uniform test of materiality of false testimony is whether the testimony was capable of influencing the tribunal on the issue before it. *United States v. Icardi,* 140 F. Supp. 383 (U.S. D.C., 1956). The *Icardi* case reflects that before an individual can be convicted of the offense of perjury he must have testified falsely before a competent tribunal acting within the scope of the authority of said tribunal and that the testimony was capable of influencing the tribunal on the issues before it. *Fraser v. United States,* 145 F.2d 145, 149, cert. den., 324 U.S. 842, 65 S.Ct. 586; *Danaher v. United States,* 39 F.2d 325 (8th Cir., 1930).

To sustain a conviction of perjury the false testimony must be given under oath before a competent tribunal, nonetheless it must also have been material to the issues before the tribunal and capable of influencing the tribunal on the issue before it. *Brown v. United States,* 245 F.2d 549 (8th Cir., 1957). In the instant cause, the inquiry was as to whether or not the Petitioner had secured a passport in some name other than his own. This was

not material nor relevant to the issue before the Commissioner. The Commissioner did not have jurisdiction to lower the bond nor to reduce the bond set by the United States District Judge for the Southern District of Texas post-indictment. Therefore, any testimony given on the issue of bond reduction was not capable of influencing the tribunal on that issue due to the fact that the Commissioner did not have jurisdiction or authority to reduce the bond of the District Court. Jurisdiction and relevancy, both as to substance and time, are necessary prerequites as a condition precedent to a conviction for giving such testimony.

The United States Commissioner's authority and function has been a subject of judicial scrutiny throughout history. The most recent legislation concerning the United States Commissioner is reflected in the Federal Magistrates Act which became effective October 15, 1968, and amended Title 28, U.S.C.A., Section 101, Chapter 43.

The minimum requirement to support a conviction for perjury is reflected in *United States v. Cutty*, 39 F. 696 (D.C. Calif., 1889). The averments and proof must support the requirements of jurisdiction, and materiality to-wit: where the false swearing was committed in a proceeding in open court the allegations and proof must show that the matter or proceeding was one in which the court was competent to act. If the court does not have jurisdiction to grant the relief sought, a perjury conviction for testimony taken at such proceeding is void. *Danaher v. United States*, 39 F.2d 325 (8th Cir., 1930).

The effect of the conviction below is to authorize and support a conviction upon the proof of any false swearing in any proceeding where the witness was sworn, regard-

less of the materiality of the testimony to the issue before the tribunal.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the United States Court of Appeals for the Fifth Circuit for action consistent with the opinion and orders of this Honorable Court so that there will be no curtailment of Petitioner's constitutionally guaranteed rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States and Rules 5(b), 5(c), 9(c)(1), 16(a), 16(b) and 40(b)(3), Federal Rules of Criminal Procedure, and Title 18, United States Code, Section 1621.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 18th day of October, A.D., 1968, conformed copies of the foregoing Petition for Writ of Certiorari were served upon the Solicitor General of the United States, Office of the Attorney General, Washington, 25, D. C. and upon the United States Attorney for the Southern District of Florida, Miami Division, 300 N.E. First Avenue, Miami, Florida, by placing copies of same in the United States mail, postage prepaid and affixed, certified, return receipt requested, air mail.

CLYDE W. WOODY

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT (IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 5.

PROCEEDINGS BEFORE THE COMMISSIONER

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer to the district court; other-

wise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

RULE 9.

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(c) *Execution or Service; and Return.*

(1.) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4(c)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

RULE 16.

DISCOVERY AND INSPECTION

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect

and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

RULE 40.

COMMITMENT TO ANOTHER DISTRICT: REMOVAL

(b) *Arrest in Distant District.*

(3.) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the Judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail

taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

UNITED STATES CODE

TITLE 18

§1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88-619, §1, 78 Stat. 995.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,734

JOSEPH STASSI, Sr., Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(August 29, 1968)

Before COLEMAN and CLAYTON*, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge: The appellant, Joseph Stassi, Sr., was convicted for violating Title 18, §1621, United States Code. The indictment was in one count

*The Honorable Claude F. Clayton was a member of the panel hearing the arguments and participating in the decision of this case. The decision of the Court, as reflected by the opinion, was unanimous, but due to the illness of Judge Clayton, occurring subsequent to the arguments and submission, he has not considered this formal opinion.

and charged essentially, that Stassi on January 26, 1966, falsely testified under oath as to a material matter before the United States Commissioner in the Southern District of Florida at Miami. At the time Stassi testified, the commissioner was conducting, at the instance of Stassi and his counsel, an inquiry to determine, among other things, an appropriate amount for an appearance bond, The indictment set forth the following questions and answers before the commissioner:

"'Q. Do you have a United States Passport under the name of a Michael Frank Dorsi—D-O-R-S-I?
A. No, sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir?'"

* * *

"'Q. (By Mr. Bates [Asst. U.S. Attorney]) Just going back here, as I understand you, you did not obtain or have anything to do with an issuance of a passport in the name of a Michael Frank Dorsi—a U.S. passport F288402, issued April 10, 1965, in Washington, D.C.?'
A. No, sir."

* * *

"'THE COMMISSIONER:
Let me ask a couple of questions before you make any statement.
Have you ever had a passport?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Do you know anything about the questions asked you by the Government dealing with a passport in Washington, D.C.?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Did you ever pose for any passport pictures?

THE WITNESS:
I have had pictures taken, but I never applied for a passport.

THE COMMISSIONER:
And is it my understanding that you do not have a passport at this time?

THE WITNESS:
Correct.' "

The indictment then charged that, as a matter of fact, Stassi had on April 7, 1965, applied for a United States passport under the name of Michael Frank Dorsi and had obtained such a passport on or about April 10, 1965. After a 22-day trial, Stassi was convicted and, upon the conviction by the jury, was duly sentenced by the District Judge.

Stassi was arrested in the Miami area of the Southern District of Florida in January, 1966, under an arrest warrant based on an indictment that had been returned in Houston, Texas, in March, 1963. As stated, the hearing before the commissioner, during which Stassi testified as

set forth above, was upon Stassi's petition to reduce his bond pending completion of proceedings to remove him from Miami, Florida, to Houston, Texas. Stassi was represented at the hearing before the commissioner by three attorneys of his own choice. There is no question but that the matter of Stassi's having received a passport under the name of Dorsi in 1965 was a matter of material interest to the commissioner with respect to the advisability of reducing Stassi's bond.

The evidence offered by the Government upon the trial for perjury allegedly committed before the commissioner, reflected that an application for a passport in the name of Michael Frank Dorsi was made in person in the office of a naturalization clerk in Hudson County, New Jersey, on April 7, 1965; the application for the passport was signed in three places. Handwriting experts, on the basis of documents known to have been signed by Stassi, testified that Stassi was the person who had signed the passport application. The Government's evidence further reflected that attached to the application for the passport was a photograph identified as being a picture of Stassi, then known to the witness in 1964 as Philip Stazzone. A Government's witness also identified a photograph as being a photograph that had been taken at a studio in West New York, New Jersey, about May 1964, which was identical to the passport photograph. The evidence further reflected that in May or June, 1963, Stassi took up residence in New Jersey under the name of Philip Stazzone. Another witness who knew Stassi under the name of Stazzone identified the Government's photograph as being a picture of the man he knew as Stazzone, but who was, in fact, Stassi. The naturalization clerk did not recognize Stassi at the trial. However, she testified

that the application was signed by the person who appeared and applied for it and that she would not have accepted the application had the appearance of the applicant not coincided with the picture attached thereto. The application for the passport, after being forwarded to the State Department, formed the basis for the issuance of the passport in the name of Michael Frank Dorsi on April 10, 1965. State Department records reflected that it was deposited in the mail on April 14, 1965, addressed to Dorsi in West New York, New Jersey. The passport was not returned or reported undelivered by the United States Post Office Department.

I.

Stassi's first argument on this appeal is directed to the sufficiency of the indictment. The indictment charges that the statements of Stassi were false in that Stassi applied for a passport under the name of Michael Frank Dorsi and had under such name obtained such a passport. It is evident from a reading of the indictment that it meets the standard of Rule 7(c), Federal Rules of Criminal Procedure, as being "a plain, concise and definite written statement of essential facts constituting the offense charged." The indictment tracks the language of the statute, setting forth, as above noted, the material parts of Stassi's testimony in the bail bond hearing in which Stassi denied that he had applied for, obtained, or had anything to do with the passport issued in the name of Michael Frank Dorsi in April, 1965. In his sworn testimony before the commissioner, Stassi unequivocally denied obtaining the Dorsi passport. It is not essential that all the testimony set forth in an indictment be false. As a matter of fact, it is better practice, both from the stand-

point of the Government and the defendant, to set forth enough of the testimony immediately before and after the alleged false statements to give some coherent context to the alleged false statements. Contrary to appellant's argument, more than one allegedly false statement may be set forth in a single count of an indictment. *Arena v. United States,* 226 F.2d 227, cert. denied 350 U.S. 954; *United States v. Otto,* 54 F.2d 277. The trial court, therefore, properly denied Stassi's motion to dismiss the indictment.

II.

Appellant further contends that the evidence upon the trial of the case failed to measure up to the standards required in a perjury prosecution. Appellant argues the "two witness" rule. However, the "two witness" rule is inapplicable where, as was the case here, the Government's evidence of falsity rested predominately on documentary evidence. *United States v. Bergman,* 354 F.2d 931; *Barker v. United States,* 198 F.2d 932. The document itself (the passport) constituted sufficient "direct" evidence to support the conviction.

United States v. Wood, 39 U.S. 430. The Supreme Court in the *Wood* case on this point stated:

> ". . . that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life. That principle is, that circumstances

> necessarily make up a part of the proofs of human transactions; that such as have been reduced to writing in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde;* . . ."

Here, not only did the Government's expert witnesses have a group of signatures by appellant in several names, including Stassi, but also had one known signature as "Michael Frank Dorsi." The expert opinions were as directly probative as the typewriting expert testimony held to be sufficient in *United States v. Collins,* 272 F.2d 650, cert. denied, 362 U.S. 911. The general rule on this point in perjury prosecutions requires that the evidence be measured for directness by the yardstick of "whether the evidence is of a quality to assure that a guilty verdict is solidly founded." *United States v. Collins, supra; Hammer v. United States,* 271 U.S. 620; *United States v. Bergman,* 354 F.2d 931. Here, the record is clear that the evidence offered by the Government in the prosecution of this perjury case — both as to handwriting and photograph — "was direct" in the sense required by the rule and this "direct" evidence was further corroborated by the circumstances showing Stassi's use of the name Dorsi in other activities, such as the purchase and trade of Rambler automobiles in New Jersey in 1965. The essence of the charge in this case against Stassi was that he, while under oath, wilfully and falsely denied having anything to do with the application for, the issuance of, or the receipt of a Dorsi passport. The evidence that he did was more than sufficient to withstand the motion for judgment of acquittal.

III.

Stassi requested the following charges be given to the jury:

"Defendant's Requested Instruction No. 6

"You are instructed that in this case the government has the burden of proving by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant knowingly and intentionally swore to a falsehood. The government's proof must be by substantial evidence excluding to the satisfaction of the jury every other hypothesis than that the defendant in testifying as he did purposefully misstated the fact knowing it to be false and untrue. (quoted from Van Liew v. U.S., 5th Cir., 321 F.2d 674).

"Defendant's Requested Instruction No. 2

"In a prosecution for perjury there must be direct and positive evidence of the alleged falsity of the statement under oath. Circumstantial evidence of such alleged falsity, no matter how persuasive it may seem, is not sufficient. If you find that the government has failed to prove to your satisfaction, by direct and positive evidence, beyond a reasonable doubt the alleged falsity of the defendant's statement under oath, your verdict must be not guilty.

Radomsky v. U.S., 9th Cir., 180 F.2d 781; Sigman v. U.S., 9th Cir., 320 F.2d 176."

Each of these instructions was refused, and this refusal is now the basis for one of appellant's claims of error. The Court's charge, as set forth in the record now presented, reflects that the trial judge actually charged that the falsity of the statements that form the basis for the prosecution had to be established beyond a reasonable doubt by two witnesses or "by a single witness and independent corroborative evidence." In view of the evidence that had been presented, the trial judge properly refused to charge that circumstantial evidence alone is not sufficient to support a perjury conviction. The district judge made it clear that the burden rested upon the Government to prove Stassi guilty beyond a reasonable doubt and that, before the jury could convict upon an indictment that charged perjury within the meaning of Title 18, § 1621, United States Code, the false statement or statements had to have been made with criminal intent and with a specific intent to deceive and had to be made "wilfully, deliberately, knowingly and corruptly. . . ." It was not necessary for the trial judge to tell the jury in addition that the evidence had to exclude every other reasonable hypothesis than that of guilt. *Holland v. United States,* 348 U.S. 121; *Gregory v. United States,* 253 F.2d 104 (5th Cir. 1958). See also: *Movible Offshore Company v. Ousley,* 346 F.2d 870 (5th Cir. 1965).

IV.

Appellant also argues to this Court that the United States Commissioner failed to inform him of his rights as required by Rule 40(b)(2) of the Federal Rules of Criminal Procedure: that he was not required to make any statement and that any statement made by him might be used against him. In this connection, the United States

Commissioner made this statement at the hearing conducted before him in January, 1966:

> "Counsel for the defendant has waived any and all rights that I may advise this defendant as they have advised me that they have fully advised the defendant of all his rights. And being competent counsel, I accept their word."

We are of the opinion that Rule 40 was fully complied with when the commissioner inquired of Stassi's retained counsel in Stassi's presence whether they had fully advised him of all his rights and then received from Stassi's counsel an affirmative answer, accompanied by an express waiver of further warnings by the commissioner. This was a bail hearing convened at Stassi's request. The hearing was not held as a commitment proceeding contemplated in Rules 5 and 40 of the Federal Rules of Criminal Procedure, under which rules the arresting officers must bring the defendant before the commissioner for the protective purpose of advising the defendant of his constitutional rights and ensuring that legal counsel is available. Here, the commissioner's duty was to conduct the bail hearing, as initiated by Stassi and his counsel, and to let Stassi and his counsel conduct his case in such a manner as they considered appropriate. The rule that witnesses who appear before grand juries do not have to be advised of their rights, and the corollary that failure to so advise does not preclude prosecution for perjury before the grand jury, is applicable to appellant's contention. See, *e.g.*, *United States v. Winter*, 348 F.2d 204, cert. denied, 382 U.S. 955; *United States v. Orta*, 253 F.2d 312, cert. denied 357 U.S. 905.

V.

The next point appellant argues relates to the manner in which the jury had been selected in the Southern District of Florida. This point was raised by defendant-appellant through a motion to dismiss the indictment based on an objection to the "array of grand jurors." Basically, the motion, which was denied by the trial judge after a hearing, contended that the jury commission breached its affirmative duty to develop and use a system which would result in a fair cross section of the community being placed on the jury rolls. The evidence taken in connection with this motion reflected that the system of selecting grand jurors in the Southern District of Florida was established in 1962. At that time all the jury boxes were purged, and the intent of the Court's action in ordering the boxes emptied and refilled was to devise an impartial system without regard to any restrictions or exclusions. In the Miami Division (the one we are now concerned with) the clerk, under specific instructions from the district judges, used a comprehensive set of city directories covering urban, suburban and rural areas. The total number of names selected was based on general population figures. For instance, for the February 1965 list, 3,000 names were selected. These names were selected from the directories within alphabetical divisions on an at random basis without regard to occupation, color, race, religion, sex or any other criteria. Questionnaires were sent out to the selected persons for the purpose of obtaining information required in order to determine whether those who had been selected on the at random basis possessed the necessary statutory qualifications. After the questionnaires were returned, the names of these qualified individuals went into a pool comparable, as this Court

understands the procedure, to the master jury wheel required by Public Law 90-274, passed by the Congress of the United States on March 27, 1968. As a matter of fact, the system as followed in the Southern District of Florida in selecting the grand jury that returned the indictment against the appellant in this case was surprisingly similar to the system Congress has now determined should be used in each of the district courts throughout the United States. The system followed in the Southern District of Florida in no way contemplated any conscious effort to include or exclude any person or group of persons based upon personal characteristics, status or circumstances. The district court, its clerk and the jury commissioner had established a nondiscriminatory method of selecting jurors that was designed to and, from the evidence offered in support of the motion to dismiss the indictment based on objections to the array of grand jurors, did represent a fair cross section of the community. Nothing more is required. *Swain v. Alabama,* 380 U.S. 202; *Brooks v. Beto,* 366 F.2d 1; *Mobley v. United States,* 379 F.2d 768, and *Rabinowitz v. United States,* 366 F.2d 34.

VI.

Appellant's final argument is that the trial judge erred in refusing to make available for inspection the grand jury testimony of a United States State Department representative. Defense counsel did timely request that the grand jury testimony of this witness be made available for use on cross-examination. The trial court refused the request. Defense counsel did not, in support of their motion, make any effort to show a particularized need for the disclosure of this grand jury testimony. Instead,

Stassi's counsel stood on the proposition that their client had a right to have his counsel peruse the minutes of the grand jury in search of inconsistencies. *Dennis v. United States,* 384 U.S. 855, relied upon by appellant, did not abolish the requirement, where a motion to inspect grand jury minutes is made, that a showing be made of a particularized need. Since no such showing was made in support of the motion, the trial court was correct in denying same.

VII.

After arguments and the submission of this case, the United States Attorney for the Southern District of Florida filed with the Clerk of this Court sealed envelopes containing copies of certain logs pertaining to electronic surveillance of a person identified as "Joe Rogers," who, according to the Government, "may be identical with appellant Joseph Stassi." As reflected by these logs, these electronic surveillances, and the conversations in which "Joe Rogers" participated, took place in 1962. This action on the part of the Government is undoubtedly precipitated by the *per curiam* opinion of the United States Supreme Court in *Kolod, et al. v. United States,* 390 U.S. 136 (1968). In *Kolod,* a petition for rehearing was filed seeking to have set aside the order of the Supreme Court that denied Kolod's application for the writ of certiorari. The petition for rehearing alleged that Kolod's counsel had been informed after the petition for the writ of certiorari was filed that Kolod's conversations had been monitored through electronic surveillance conducted by a governmental agency. The Supreme Court invited the Solicitor General to respond to the petition for rehearing. The Court interpreted the Solicitor General's response as admitting the electronic surveillance but "justifying nondisclosure

on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution." The Supreme Court held that, "We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court."

A study of the logs now filed reflect, without question, that the conversations in which "Joe Rogers" participated and were overheard by Government agents are clearly unrelated to the case now before this Court. After an examination of the tendered logs *in camera,* we now make such a determination in lieu of remanding the case to the District Court for that purpose. This procedure has recently been approved by the Seventh Circuit in *United States v. Battaglia* and *Evans* [Nos. 16312 and 16313], April 10, 1968, ____ F. 2d ____. As the Seventh Circuit pointed out in *Battaglia,* it is not unusual for appellate courts "to determine relevancy as a matter of law." This is all the District Judge could do upon remand. Accordingly, there is no purpose to be served in remanding for the purpose of the District Judge's reviewing the logs now filed with the Court. We do, however, direct the Clerk of this Court to reseal the envelopes containing the logs and to make said envelopes a part of the record in this case for use in such other appellate review as may be sought.

We are clear to the conclusion that Stassi received a fair trial, free from substantial error. The case is therefore

AFFIRMED.

APPENDIX C

Supreme Court of the United States

No._____, October Term, 1968

JOSEPH STASSI, SR., Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct. 21, 1968.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 30th day
of September, 1968.